Hor Chee Meng v Yeng Chong Realty Sdn Bhd (No 1)

HIGH COURT (KUALA LUMPUR) — SUIT NO D28–984–11 OF 2011
HASNAH MOHAMMED HASHIM J
2 MAY 2012

Companies and Corporations — Petition — Application to strike out — Winding up petition withdrawn — Settlement of debt due — Absolve of payment of debt under judgment — Whether liquidated ascertained damages paid in full — Companies Act 1965 s 218(2)(a)

The petitioner had purchased a bungalow lot from the respondent and the project was developed jointly between the respondent and MBSB Sdn Bhd. The parties entered into a sale and purchase agreement ('SPA') and the petitioner paid the full purchase price of RM69,732. In his claim for late delivery of vacant possession, the petitioner proceeded to file a suit in the magistrate court for liquidated damages. The petitioner was successful in his application and obtained the judgment against the respondent. The petitioner went on to file a winding up petition ('the first winding up petition') and the respondent offered to settle the sum of RM21,917.65 claimed under the petitioner's s 218 notice (of the Companies Act 1965). The express term of the offer was made on the basis that payment would absolve the respondent of the debt under the judgment. The parties reached a settlement to settle the amount of RM24,708.48 and the first winding up petition was then withdrawn. The issue to be determined by the court was whether the liquidated ascertained damages ('LAD') had been paid in full.

Held, allowing the application:

(1) By virtue of s 218(2)(a) Companies Act 1965 ('Act'), a company should be deemed to be unable to pay its debts if a creditor to whom the company was indebted in a sum exceeding RM500 and notice of it had been given requiring the company to pay the sum so due and thereafter neglected to pay that sum. The failure on the part of the company to pay as demanded would trigger the presumption that the company was unable to pay its debt. This presumption was rebuttable and the onus would then shift to the respondent to show that it was able to pay the debt and serve an affidavit in opposition to the petition (see para 13).

(2) The amount claimed as LAD by the petitioner remained unpaid. Furthermore, apart from the bank draft there was no other evidence shown as proof of the solvency of the respondent or any other contemporaneous document evidencing latest audited accounts to

impress upon the court the ability of the respondent to meet its liabilities. Therefore the statutory demand issued pursuant to s 218 of the Act remained unsatisfied. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not in any way displaced (see para 18).

[Bahasa Malaysia summary

Pempetisyen telah membeli lot banglo daripada responden dan projek tersebut dibangunkan secara bersama di antara responden dan MBSB Sdn Bhd. Pihak-pihak memasuki perjanjian jual dan beli ('SPA') dan pempetisyen membayar harga penuh sebanyak RM69,732. Dalam dakwaannya untuk penghantaran lewat milikan kosong, pempetisyen meneruskan untuk mmefailkan tindakan di mahkamah majistret untuk ganti rugi yang ditetapkan. Pempetisyen berjaya dalam permohonannya dan memperolehi penghakiman terhadap responden. Pempetisyen terus memfailkan petisyen penggulungan ('petisyen penggulungan pertama') dan responden menawatkan untuk menyelesaikan jumlah RM21,917.65 yang dituntut di bawah notis s 218 (Akta Syarikat 1965) pempetisyen. Terma nyata tawaran tersebut dibuat atas dasar bahawa bayaran akan membebaskan responden daripada hutang di bawah penghakiman. Pihak-pihak mencapai penyelesaian untuk menyelesaikan jumlah RM24,708.48 dan petisyen penggulungan pertama ditarik balik. Isu yang akan ditentukan oleh mahkamah adalah sama ada ganti rugi yang ditetapkan telah dibayar sepenuhnya.

Diputuskan, membenarkan permohonan:

(1) Mengikut s 218(2)(a) Akta Syarikat 1965 ('Akta'), syarikat patut dianggap tidak boleh membayar hutangnya jika pemiutang kepada siapa syarikat berhutang melebihi jumlah RM500 dan notis mengenainya telah diberikan mengkehendakki syarikat membayar jumlah yang kena dibayar dan kemudiannya cuai untuk membayar jumlah tersebut. Kegagalan oleh pihak syarikat untuk membayar seperti yang dikehendakki akan mencetuskan anggapan bahawa syarikat tersebut tidak boleh membayar hutangnya. Anggapan ini boleh dipatahkan dan tanggungjawab akan kemudiannya beralih kepada responden untuk menunjukkan bahawa ia boleh membayar hutang dan menyerahkan afidavit bertentangan petisyen (lihat perenggan 13).

(2) Jumlah yang dituntut sebagai ganti rugi yang ditetapkan oleh pempetisyen kekal tidak berbayar. Selanjutnya, selain daripada draf bank tidak terdapat keterangan ditunjukkan sebagai bukti kesolvenan responden atau apa-apa dokumen semasa yang lain yang membuktikan akaun-akaun yang diaudit terkini untuk menarik perhatian mahkamah keupayaan responden untuk membayar liabiliti-liabilitinya. Oleh itu permintaan statutori yang dikeluarkan berikutan s 218 Akta kekal tidak dipenuhi. Anggapan ketidakupayaan untuk membayar

hutang-hutangnya secara nyata diperuntukkan di bawah peruntukan tersebut digunapakai terhadap responden dan tidak dalam apa jua cara digantikan (lihat perenggan 18).]

Notes

For a case on application to strike out, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 668.

Cases referred to

Citibank Bhd v Malwira Manufacturing Sdn Bhd [2012] 3 CLJ 81, HC (refd)
Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 1 LNS 360, CA (refd)
Kee Chai Heng v Ketua Polis Daerah Kuala Muda & Anor [1999] 2 MLJ 668; [1999] 2 CLJ 664, HC (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)
Perbadanan Labuan v Sabah Urban Development Corporation Sdn Bhd [2009] 6 CLJ 700, HC (refd)
Sri Hartamas Developement Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325; [1992] 1 CLJ 303, SC (refd)

Legislation referred to

Companies Act 1965 ss 205, 217(1), 218(1), 218(1)(d), (l), (m), (n), (2)(a)
Insurance Act 1996
Subordinate Courts Act 1948 s 90
Rules of the High Court 1980 O 14A

Prakash Mehta (K Nadarajah & Partners) for the petitioner/respondent.
George Dicom (Sunita Sankey with him) (AG Dicom & Co) for the respondent/appellant.

Hasnah Mohammed Hashim J:

[1] Enclosure 1 is the petition to wind up the respondent and to appoint the official receiver as the liquidator.

BRIEF FACTS

[2] The petitioner purchased a bungalow lot from the respondent. The project was developed jointly between the respondent and MBSB Sdn Bhd. The parties entered into a sale and purchase agreement dated 10 June 1999 ('SPA') and the petitioner paid the full purchase price of RM69,732. The petitioner then claimed for late delivery of vacant possession and filed a suit in the magistrate court for liquidated damages on 22 September 2003.

[3] The petitioner obtained judgment against the respondent on 28 April 2006. On 23 June 2006 the petitioner filed a winding up petition (the first winding up petition). The respondent made an offer to settle the sum of RM21,917.65 claimed under the petitioner's s 218 notice. The express term of the offer was made on the basis that payment would absolve the respondent of the debt under the judgment. Subsequently on 2 October 2006 the parties reached a settlement to settle the amount of RM24,708.48. The first winding up petition was then withdrawn.

THE PETITIONER'S ARGUMENTS

[4] The petitioner's claim against the respondent is for the sum of RM35,654.55 for liquidated ascertained damages ('LAD') for late delivery of a bungalow lot from 11 May 2006 to 15 September 2011. Judgment was obtained in the magistrate court on 28 April 2006 for LAD amount of RM4,631 as at 14 January 2008. The respondent's appeal to the High Court was dismissed on 14 January 2008.

[5] The petitioner had fully paid the purchase price of the bungalow lot on 20 April 2009 as per the SPA. The petitioner had filed an originating summons on 21 June 2011 for a declaration to have the SPA terminated for failure to deliver the bungalow lot and the money refunded. However, the High Court decided that since the petitioner had made an election to sue for LAD and obtained judgment on 28 April 2006 the agreement cannot be terminated. On 15 September 2011 the petitioner issued a fresh claim from 11 May 2006 to 15 September 2011 for the outstanding LAD.

[6] Learned counsel for the petitioner submitted that the respondent's allegation that LAD had been paid in full misconceived since LAD payment from 10 June 2002 until 10 May 2006 had only been paid based on the first winding up order.

THE RESPONDENT'S ARGUMENTS

[7] The petitioner filed an originating summons in 2011 for, inter alia, a declaration that further sums be paid under the compromised judgment. It is submitted by learned counsel for the respondent that that the petitioner was aware at that stage that no recourse could be had to the judgment as it had been compromised. Furthermore the issue of whether a compromise has been reached is now before another court (22NCC-2169–12 of 2011). The court had directed on 2 February 2012 that the issue be disposed of by way of an O 14A application.

[8] It is further submitted that the judgment was issued by the magistrate's

court and is therefore subject to s 90 of the Subordinate Courts Act 1948. The magistrate court has the jurisdiction to award a sum not exceeding RM25,000.

[9] Learned counsel for the respondent further submitted that there are no statutory enactments which would enlarge the jurisdiction of a magistrate to grant a sum or have intended to grant a sum in excess of RM25,000 (re *Perbadanan Labuan v Sabah Urban Development Corporation Sdn Bhd* [2009] 6 CLJ 700; *Kee Chai Heng v Ketua Polis Daerah Kuala Muda & Anor* [1999] 2 MLJ 668; [1999] 2 CLJ 664).

[10] It is also submitted that the respondent is solvent and has produced as evidence a bank draft to show that they have monies to meet the respondent's purported claim under the petition as it falls due.

DECISION

[11] In a winding up of a company the persons who may present an petition for winding up is provided under s 217(1) of the Companies Act 1965namely:

(a) the company;

(b) any creditor, including a contingent or prospective creditor, of the company;

(c) a contributory or any person who is the personal representative of the deceased contributory or the trustee in a bankruptcy;

(d) the liquidator;

(e) the Minister pursuant to s 205 or on the ground specified under s 218(1)(d);

(f) Bank Negara Malaysia if it is a licensed institution;

(g) Bank Negara Malaysia in the case of a company which is licensed under Insurance Act 1996;

(h) The registrar on the ground specified in s 218(1)(m) or (n).

[12] Section 218(1) of the same Act list out the circumstances a company may be wound up by an order of the court if —

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year,

(d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any manner whatsoever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that is of opinion—

(i) that the company cannot pay its debts …; or

(ii) that it is in the interest of the public or shareholder …

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs …

(i) the court is of the opinion that it is just and equitable that the company be wound up;

(j) the company held a license under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 and that license has been revoked or surrendered;

(k) the company has carried on Islamic banking business … in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be;

(l) the company has held a license under the Insurance Act 1966 and —

(i) license has been revoked;

(ii) Bank Negara has petitioned for its winding up …

(iii) an order under paragraph 59(4)(b) of the Insurance Act 1966 has been made …

(m) the company is being used for unlawful purposes …

(n) the company is being used to any purpose prejudicial to national security …

[13] Section 218(2)(a) of the Companies Act 1965 provides that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding five hundred ringgit and notice of it has been given requiring the company to pay the sum so due and thereafter neglected to pay that sum. The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt. This presumption is rebuttable and the onus will then shift onto the respondent to show that it is able to pay the debt and serve an affidavit in opposition to the petition.

[14] According to the case of *Morgan Guaranty Trust Co of New York v Lian*

Seng Properties Sdn Bhd [1991] 1 MLJ 95, prima facie a creditor, like the petitioner here, who has not been paid has the right to file a petition for winding up whatever its other motives may be.

[15] Justice Abdul Malik Ishak JCA in the case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 1 LNS 360 said that:

> The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as '*unable to pay its debts*' even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities.

[16] The Supreme Court in *Sri Hartamas Developemnt Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325; [1992] 1 CLJ 303 held that '… a company may have wealth locked up in investments not presently realizable … yet if it has no assets available to meet its current liabilities, it is commercially insolvent and may be wound up'.

[17] George Varghese, JC (as he then was) in the case of *Citibank Bhd v Malwira Manufacturing Sdn Bhd* [2012] 3 CLJ 81 referred to *Sri Hartamas*'s case and in his judgment said that:

> The respondent did not produce any contemporaneous document in respect of the current operations, its management or latest available audited accounts to impress the court that it was an ongoing concern and/or that it was able to meet its liabilities as and when they became due so as to show that it was not commercially insolvent. The respondent's inability to pay its debts was drawn from all the relevant facts of this case as made available to the court.

[18] In the instant case the amount claimed as LAD by the petitioner remained unpaid. Furthermore apart from the bank draft there is no other evidence shown as proof of the solvency of the respondent or any other contemporaneous document evidencing latest audited accounts to impress upon the court the ability of the respondent to meet its liabilities. Therefore the statutory demand issued pursuant to s 218 of the Companies Act 1965 remained unsatisfied. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not in any way displaced.

[19] I have perused and considered the submissions and authorities of the parties and based on the above considerations and reasons I find that the

petition should be allowed as there is sufficient evidence to show that the respondent is insolvent and unable to pay its debts.

Application allowed.

Reported by Ibnu Aswan